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EXHIBIT 5
DATE 1/25/13
HB 186

# MEMORANDUM

To: Harold Blattie, MACo Executive Director

From: Michael W. Sehestedt, MACo General Counsel

Re: HB 186

Date: January 15, 2013

While I believe that everyone but (perhaps) some members of the plaintiffs' bar finds the current limitations on the ability or willingness of the courts to impose sanctions for actions brought on flimsy or nonexistent grounds objectionable, House Bill 186 will give little of value to defendants, since the liability for attorney fees is imposed on the plaintiffs who, particularly in the most annoying pro sé cases, are likely to lack the resources to pay substantial attorney fees and other costs even if awarded. Certainly, this has been my experience with those costs which are awarded under current law against unsuccessful plaintiffs.

Against this limited (and perhaps illusory) gain, the impact on all other cases must be balanced. Most cases filed are cases with a substantial factual basis. In many cases, the liability is not disputed, but the amount of damages is subject to legitimate dispute.

Under current law, in a case where liability is reasonably clear but damages are disputed, the ability of the defendant to obtain settlement for less than the full amount demanded by plaintiff rests on two bases: the first is the actual merits of the claimed damage amount which, with battling experts, is often a classic jury question; and the second is the fact that to pursue a damages claim unreasonably under current law requires the expenditure of resources (lawyer time) for which the only recovery will be out of the amount recovered as damages. This acts as a natural check on unreasonable demands, since there is no reason to pursue a claim past the point of maximum probable net recovery (what the plaintiff gets after deducting the cost of his/her attorney).

The change proposed by HB 186 completely eliminates the second basis, since in a clear liability case the only risk is that a jury will find that the defendant's expert was right and award a lower amount in damages than the plaintiff is demanding. The attorney for the plaintiff will, however, be awarded his/her attorney fees for the cost of taking the matter to trial. The net result of this Bill is a lawyer's relief act that will reward unreasonable demands and a refusal to settle, since the cost of a good faith defense to liability or, in an admitted liability case, a good faith dispute as to damages creates exposure to an award not only of damages but of attorney fees as well. Effectively, this means the cost of settling any case with merit will go up since the defendant is now exposed to more risk.

This is the situation that exists in the federal system for 42 USC § 1983 actions. The result there is that the most trivial violations, even those which involve only nominal actual damages, create an almost unlimited exposure. Because of the exposure to attorney fees for an unsuccessful defense, § 1983 cases have a much higher settlement value than would otherwise be the case. If the defense isn't sure it can "hit it out of the park" and prevail on liability, the case is worth quite a bit more than the likely actual damages. The effect of HB 186 is to place every case in this category with a concomitant increase in the settlement value of the cases.

About the only way that defendants will be able to protect themselves from a $1,000 damage award accompanied by an award of $100,000 in attorney fees is to make an early offer of judgment reasonably in excess of the amount that a jury is likely to find in damages, together with attorney fees and costs accrued to date. While this results in the defendant paying more to settle than would be the case without the automatic award of attorney fees to the prevailing party, it does place some risk on the attorney pursuing the case; since if the ultimate recovery is less than the amount offered by the defendant, the plaintiff's attorney fee recovery is limited to the amount accrued to the date of the offer of judgment.

Despite its superficial appeal, this Bill reverses entirely the longstanding "American Rule" with regard to damage claims, under which each party pays their own attorney fees; and it will have adverse impacts far beyond its stated purpose of punishing those who bring frivolous lawsuits unsupported by the facts or the law.

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